

NO. 41393-1-II
Cowlitz Co. Cause NO. 08-1-01255-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA R. PHILLIPS,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JAMES B. SMITH/WSBA #35537
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. PROCEDURAL HISTORY

The appellant was charged by amended information with attempted robbery in the first degree, robbery in the second degree, theft in the second degree, and solicitation to commit murder in the first degree. The appellant proceeded to jury trial on August 16, 2010, before Lisa Tabbut, an attorney sitting as judge *pro tempore*. Subsequently, the jury found the appellant guilty of robbery in the second degree, theft in the second degree, and solicitation to commit murder in the first degree. The appellant was found to be a persistent offender and received a mandatory sentence of life in prison without the possibility of early release. The instant appeal timely followed.

II. STATEMENT OF THE CASE

The State generally agrees with the factual and procedural history as related by the appellant. Where appropriate, the State will cite to further facts in the record.

III. ISSUES PRESENTED

1. Was the *pro tempore* trial judge improperly appointed?
2. Was the appellant deprived of his right to be present during the proceedings?

IV. SHORT ANSWERS

1. No.
2. No.

V. ARGUMENT

I. The Trial Judge Was Properly Appointed as a Judge *Pro tempore*.

The appellant argues that the trial judge was improperly appointed *pro tempore* to hear the case, thus the trial court was without jurisdiction and his convictions improper. Specifically, the appellant claims that the lack of an oral colloquy between the judge and himself is error that rendered the appointment invalid. The appellant argues the lack of such a colloquy violates Article 4, Section 7 of the Washington State Constitution. However, the plain language of Art. 4, § 7 contradicts this claim, as does the caselaw interpreting this constitutional provision. As such, the Court should reject this argument.

In this case, the *pro tempore* trial judge was a member of the bar serving as judge pursuant to the agreement of the parties. Thus, the relevant portion of Art. 4 Section § is as follows:

A case in the superior court may be tried by a judge *pro tempore* either with the agreement of the parties if the judge *pro*

tempore is a member of the bar, is *agreed upon in writing by the parties litigant or their attorneys of record*, and is approved by the court and sworn to try the case... (emphasis added).

As made clear by the plain language of the constitution, either the parties or their attorneys may agree to allow a member of the bar to serve as judge *pro tempore*. Though the constitution contemplates that this agreement will be in writing, oral consent is sufficient if given by either the parties or their attorneys. State ex rel. Cougill v. Sachs, 3 Wn. 691, 694, 29 P. 446 (1892). However, where there is no written agreement or oral consent, mere acquiescence by the parties or their attorneys is insufficient. State v. Belgarde, 119 Wn.2d 711, 719-720, 837 P.2d 599 (1992).

Here, the appellant's argument is based upon State v. Sain, 34 Wn.App. 553, 663 P.2d 493 (1983). In Sain, the appellant was tried before a member of the bar sitting as a judge *pro tempore*. At trial, the appellant's attorney agreed, subject to his client's later consent, to the appointment. Later, the defendant actually objected to the judge's appointment and refused to sign the written agreement. At that time, the defendant's attorney objected to the proceedings, arguing the appointment was invalid and the court without jurisdiction. Nonetheless, the trial judge persisted with the trial. Unsurprisingly, the judge's appointment was found invalid on appeal.

The record in the instant case bears no relation to that in Sain. There both the attorney and the defendant objected to the appointment. Here, the appellant never objected or voiced any disagreement with the appointment of the judge *pro tempore*. In fact, the appellant was present in court when the trial judge discussed her appointment. RP 288-289. At that time, the judge stated that:

I am sitting here today as a judge pro tem. Both attorneys have signed off on that. I understand that Mr. Blair as talked to Mr. Phillips and gotten Mr. Phillip's agreement.

RP 289. Neither the appellant nor his attorney contested this statement. Contemporaneously, a written agreement, signed by the attorneys of record for the parties, was filed. CP 113-114. At no point during the trial did the appellant or his attorney argue the written agreement was invalid or the court was without jurisdiction to hear the case.

Now, the appellant argues the appointment was invalid because he did not personally sign the agreement or state his assent orally. Unfortunately for the appellant, this claim has been rejected in State v. Osloond, 60 Wn.App. 584, 805 P.2d 263 (1991). The facts of Osloond are indistinguishable from this case: a written agreement signed by the attorneys was filed and the defendant did not object at trial. On appeal, the defendant claimed the appointment was invalid for the exact reasons the appellant argues here. This claim was denied, as the court noted that Art.

4, § 7 does not require any additional personal consent be given by the parties when the attorneys have given written consent. 60 Wn.App at 586. Osloond is controlling authority in this case, as the court decided the exact factual and legal scenario at issue here.

Similarly, in State v. Robinson, 64 Wn.App. 201, 825 P.2d 738 (1992), the court rejected a claim that an appointment was invalid where the defendant argued he had not personally agreed and was in fact unaware he was being tried by a judge *pro tempore*. There, the court noted that the plain language of Art 4, § 7 allows for the attorneys of record to consent to trial by a judge *pro tempore*, expressly holding that “The constitution does not require an attorney to obtain his client’s consent before signing such a stipulation.” Robinson, 64 Wn.App. at 204. See also, Burton v. Ascol, 105 Wn.2d 344, 715 P.2d 110 (1986) (surety may not object to appointment of judge *pro tempore* where the insured’s attorney had agreed). Thus, as the constitution allowed a party’s attorney to consent to a judge *pro tempore*, the defendant’s argument was without merit and his conviction was affirmed.

Furthermore, the appellant’s claim that there is a “substantive” right to trial by an elected judge of the superior court based on Article 4, Section 5 of the Washington State Constitution, is incorrect. The Supreme Court specifically addressed this issue at length in Belgarde, holding:

Belgarde essentially argues that article 4 section 7 of the Washington State Constitution expresses constitutionally required procedures which protect the article 4 section 5 right to be tried by an elected superior court judge. While article 4 section 7 does express constitutionally required procedures that may, in fact, function in this manner, article 4, section 5 does not function as petitioner argues. Article 4, section 5 of our state constitution requires that at least one superior court judge in each county shall be elected:

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election....

Const. art. 4 § 5. This provision necessarily envisions that unelected superior court judges will perform judicial duties and exercise judicial powers. Moreover, Const. art. 4, § 5 does not expressly grant a right to a trial presided over by an elected superior court judge, the premise upon which Belgarde's argument turns.

Although the Washington Constitution, article 4, section 5, does not provide textual support for Belgarde's position, he contends decisions of this court recognize a constitutional right to a trial presided over by an elected superior court judge. We disagree. Contrary to Belgarde's suggestion, this court in State v. Hastings, 115 Wash.2d 42, 793 P.2d 956 (1990), did not decide that the right to be tried by an elected superior court judge is a substantive right. Rather, the court addressed the issue whether consent was a jurisdictional requirement for appointing a district court judge *pro tempore*. Hastings, at 44-46, 793 P.2d 956.

Belgarde also misreads the decision in State v. Sain, 34 Wash.App. 553, 557, 663 P.2d 493 (1983). In Sain, the Court of Appeals addressed the narrow question whether an attorney could consent to his client's being tried by a judge *pro tempore* in the face of the client's express refusal in open court to the appointment of a judge *pro tempore* to preside over the trial. To the extent that petitioner reads Sain as prohibiting attorneys from appointing a judge *pro*

tempore, this reading conflicts with the express language of Const. art. 4, § 7 ^{FN4} and must therefore fail.

FN4. “A case in the superior court may be tried by a judge, *pro tempore*, ... agreed upon in writing by the parties litigant, *or their attorneys of record...*” (Italics ours.) Const. art. 4, § 7.

Belgarde, 119 Wn.2d at 720-721.

From Belgarde, it is clear that there is no substantive right to trial before an elected judge of the superior court, and further that the written agreement of the attorneys of record is sufficient to allow for the appointment of a judge *pro tempore*. However, the appellant ignores this authority and instead claims that there must be an oral colloquy with the defendant before a person may waive his “right” to an elected judge. As Belgarde indicates, there is in fact no such right. Also, though it would not be improper for the trial court to engage a party in a colloquy regarding the appointment of a judge *pro tempore*, it is neither constitutionally mandated nor necessary. Art. 4, § 7 on its face allows for the written agreement by the attorneys of record. The appellant’s attorney of record agreed in writing to the appointment of the judge *pro tempore*. The trial judge advised the appellant of this, and stated on the record that the appellant’s attorney had discussed this issue with him and that he agreed to the appointment. RP 288-289. In the absence of any objection or equivocation by the appellant or his attorney, neither the constitution nor

the caselaw requires any further inquiry. As such, this Court should find the trial judge was properly appointed and the appellant's convictions were proper.

II. The Appellant's Right to Be Present at Trial Was Not Violated.

The appellant contends his right to be present at trial was violated when he was absent from the courtroom for a brief period of time while closing arguments and jury instructions were discussed. However, as these proceedings were not a critical stage of the trial, the appellant's absence did not violate his right to be present. The Court should deny this claim as well.

After discussing jury instructions in chambers, the parties reconvened in the courtroom. The appellant was absent from the following portion of the proceedings:

RP 1173-1174: Discussion of use of the projector by the State to display a portion of the bodywire transcript during closing arguments;

RP 1175: Mr. Blair objects to the State displaying the transcript in closing, trial court defers ruling on this issue;

RP 1175-1176: Trial court numbers the jury instructions;

RP 1176-1177: State objects to the trial court's decision to omit the "abiding belief" from the reasonable doubt jury instruction;

RP 1178-1179: Mr. Blair objects to the giving of an accomplice liability instruction, and the failure to give a lesser-included offense instruction for possession of stolen property in the second degree and a witness missing instruction;

RP 1179: State responds to Mr. Blair regarding lesser-included offense and missing witness instructions;

RP 1180-1181: Mr. Blair makes further argument regarding lesser-included offense and missing witness instructions;

RP 1181-1182: Trial court rules that missing witness and lesser-included offense instructions will not be given;

RP 1182: Appellant appears in courtroom.

After the appellant had reentered the courtroom, the trial court then entertained further argument on the State's use of visual aids during closing.

As can be seen by this summary, the appellant was absent for approximately ten pages of the trial transcript. During this period of time, no evidence was taken whatsoever. Instead, the parties engaged in legal discussion and argument regarding the propriety of various jury instructions. This brief proceeding was not a "critical phase" of the trial at which the appellant's presence was necessary. State v. Bremer, 98 Wn.App. 832, 991 P.2d 118 (2000); In re Lord, 123 Wn.2d 296, 868 P.2d

835 (1994). The appellant's counsel was present, and vigorously represented his interests to the court. The appellant's physical presence would have had discernible effect on the outcome of these purely legal issues, and he has failed to raise any plausible claim of prejudice. Given this, the Court should hold the appellant's absence for this portion of the proceedings was not improper.

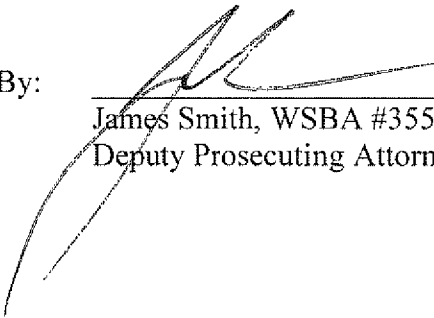
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The issues asserted by the appellant are not well founded in either the record or the law. The appellant's convictions should stand.

Respectfully submitted this 28th day of November, 2011.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By:



James Smith, WSBA #35537
Deputy Prosecuting Attorney

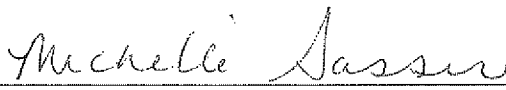
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahays@qwestoffice.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 29th, 2011.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 29, 2011 - 9:29 AM

Transmittal Letter

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